THE PLAINTIFF'S ILLEGAL ACT AS A DEFENSE IN ACTIONS OF TORT.

IN order to avoid misapprehension as to the scope of this article, it should be stated at the start that it is not proposed to discuss cases in which the action is for the conversion of property obtained under an illegal contract, or cases in which it is alleged that the parties were jointly engaged in an unlawful enterprise. The discussion is to be confined to cases in which the relation of the parties did not arise out of an illegal contract, and in which the defendant was not acting in concert with the plaintiff, but was chargeable with negligence only. From these cases, again, are to be excluded those in which the question is whether or not the fact that the plaintiff's act was unlawful is evidence of contributory negligence. The cases to be considered are those in which physical damage has been done to the plaintiff's person or property through the defendant's negligent acts or omissions, so that an action would doubtless lie but for some unlawful act by the plaintiff which is alleged to have been a contributing cause of the damage. Furthermore, those cases only are to be discussed in which the unlawful act was in no sense an offense against the defendant personally, but was a breach of some duty to the public for which the plaintiff might have been prosecuted criminally.

The right of a plaintiff to recover in this class of cases has been one of the most disputed questions in the whole law of torts; yet there seems to be a general agreement as to the principles on which such cases are to be decided. It is conceded by all that, if the unlawful act was the cause, or a concurring cause, of the damage, the action is barred, and not otherwise. The whole controversy is as to what acts are to be considered causes and what mere conditions.[1] It must be admitted that the present strong

[1] "While all or nearly all of the courts of last resort in the United States that have had the subject under consideration agree in the legal proposition that any culpable negligence or any illegal act on the part of the plaintiff which essentially contributes to his injury will prevent a recovery, yet there is a marked difference of opinion as to what constitutes a contributory cause of injury." *Per* LOOMIS, J., in Broschart *v.* Tuttle, 59 Conn. 1, 13. The United States Supreme Court appears to deny the whole doctrine that the action fails if the plaintiff's unlawful act was a concurring cause. Philadelphia,

tendency is to construe the word "cause," for this purpose, very narrowly, so that the defense based on the plaintiff's unlawful act is reduced almost to a nullity. It is, therefore, at the risk of some appearance of presumption that the writer asserts that the well-known Massachusetts decisions, giving a much broader scope to this defense, are not entirely wrong — that, on the contrary, many of them may be supported as sound in result, if not always in reasoning.

It is not contended, indeed, that all the Massachusetts decisions are consistent, either with themselves or with the principles on which they purport to rest. If, for example, White *v.* Lang[1] is right, it seems impossible not to say that Lyons *v.* Desotelle[2] is wrong. But it is an error to assume that these cases must all stand or fall together. Again, it is sometimes supposed that the Massachusetts court made a distinction between cases of violation of the Sunday law and cases involving other illegal acts, denying recovery in the former and permitting it in the latter.[3] This is a misconception. Recovery was refused in Heland *v.* Lowell[4] and in Banks *v.* Highland Railway,[5] in neither of which cases was the Sunday law in any way involved. Yet the court followed the same reasoning as in the cases relating to the Sunday law. Indeed, in Heland *v.* Lowell, the authority relied on was Bosworth *v.* Swansey,[6] which is the leading case denying recovery to a person injured while travelling on Sunday.[7]

The contention is, accordingly, that the right result in cases of this kind is midway between the two extremes — that while the Massachusetts court went too far in refusing recovery in such cases as Lyons *v.* Desotelle[8] and Stanton *v.* Metropolitan Railroad,[9] the

---

etc, R. R. *v.* Philadelphia, etc., Towboat Co., 23 How. (U. S.) 209. This is on the ground that the rule involves inflicting an unauthorized penalty for breaking the law. The same position is taken in Pennsylvania. Mohney *v.* Cook, 26 Pa. St. 342; Piollet *v.* Simmers, 106 Pa. St. 95. If these cases go farther than to affirm that the wrong-doer is not to be regarded as an outlaw, they seem opposed both to principle and to authority. See the vigorous treatment of the subject in Broschart *v.* Tuttle, *supra*, at p. 19.

[1] 128 Mass. 598. [2] 124 Mass. 387.

[3] See, for example, Broschart *v.* Tuttle, 59 Conn. 1, 14.

[4] 3 Allen (Mass.) 407. [5] 136 Mass. 485.

[6] 10 Met. (Mass.) 363.

[7] Bosworth *v.* Swansey was also cited with approval in Tuttle *v.* Lawrence, 119 Mass. 276, in which case the illegal act consisted in the violation of a speed ordinance, though the immediate question was as to the burden of proof.

[8] 124 Mass. 387. [9] 14 Allen (Mass.) 485.

New York court, for example, went as much too far in the other direction in permitting recovery in Platz *v.* Cohoes,[1] and that many of the Massachusetts decisions, denying recovery, are entirely sound.

Before proceeding to an examination of the cases, two preliminary matters should be considered. The first is that the abstract things called "negligence" and "illegality" never *caused* anything and never will. Physical results, if due to human agency at all, are caused by physical acts.[2] "Negligence" and "illegality" are simply qualities which characterize acts. If we speak of a result as "caused by negligence," this is only a short way of saying that the result was caused by acts which were characterized by negligence. In the same way, a result cannot properly be said to be caused by a person's breach of the law, unless we understand by this that the result was caused by the *act* which constituted the breach of the law. For most purposes the distinction is rather pedantic than important. In the present case, however, it is essential to remember that if we mean anything when we speak of "negligence" and "illegality" as causes, we mean negligent *acts* and illegal *acts*.

The second consideration is that there is a radical difference between the *cause* of an accident and the *blame* for it. In the ordinary action based on the defendant's negligent acts, the distinction may safely be, as it generally is, disregarded. This is not because it is not a real one, but because, in fixing liability, the law seeks out some negligent act among the many acts which form the chain of causation leading up to the result. If such an act is found and is not too remote from the result, the person responsible for it is held liable for the damage. The person thus responsible cannot, as a rule, be heard to say that the acts of others, perhaps those of the plaintiff himself, were even more directly the cause of the result than the act complained of. This may have been so, yet, in the eye of the law, the fact is irrelevant: the only question is whether the defendant's negligent act was a part of the chain of causation and not unreasonably remote from the result. It has thus become customary to speak of this act as the proximate cause of the result, as if no other act had anything immediately to do with it. And, for most purposes, no harm is done by this usage. But a

---

[1] 89 N. Y. 219.

[2] For convenience, the word "act" will be used in the broad sense proposed by Mr. Salmond, *i. e.*, as including both positive acts and omissions. See Salmond, Jurisprudence § 129.

case may arise in which it is important to decide whether the negligent act was not only in name but in fact the sole immediate cause. In such a case, it must not be overlooked that it by no means follows that because a person is to blame for a result, his acts were the immediate cause of it. It may well be that, considered purely as a matter of fact, some other act or acts constituted the active, efficient cause, and that the defendant's act was only a comparatively remote cause.

To illustrate. X drives carefully upon a bridge. The bridge is defective and gives way. Y is under a duty to exercise care in keeping the bridge safe, but the defect was of such a nature that it could not have been discovered by any exercise of care: hence, no one can be held liable for the accident. It seems plain that, in such a case, the act of driving is the active, immediate cause of the damage. The defect in the bridge was only a passive, antecedent condition: if, after the defect came into existence, nothing more had been done, no damage would have resulted to any one, though the defect remained for a hundred years. The defect was, to be sure, a *causa sine qua non*: the accident would not have happened if the bridge had been in good condition. But it was a comparatively remote cause: damage could result from it only when some active agency supervened. It seems evident that the latter is the immediate, efficient cause of the result, not the dangerous antecedent condition. As was said by Appleton, C. J., in a much-quoted opinion, "The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. . . . Ordinarily, that condition is usually termed the cause, whose share in the matter is most conspicuous and is the most immediately preceding and proximate to the event." [1]

Now it is obvious that the question of liability cannot make any difference in the matter of cause. If the case put above be varied by supposing that the defect was one which Y might have discovered, had he acted with due diligence, he is, of course, to blame for the accident and must pay damages. It will be useless for him to contend that X's own act of driving was the immediate cause of the damage. He is liable if his negligent failure to repair the bridge forms any part of the train of causation leading up to the accident, unless it be unreasonably remote from it. But this cannot alter the fact that it was X's act and not Y's omission that constituted the active, immediate cause.

[1] Moulton *v.* Sanford, 51 Me. 127, 134.

In like manner, the fact that one of the acts leading up to the result was characterized by illegality cannot affect the question of cause. If the case above be again varied by supposing that X, in driving upon the bridge, acted unlawfully, it is plain that there is no difference in the matter of causation. The fact that X's act is characterized by illegality cannot make it any less the immediate cause than if it were lawful. Neither can the fact that Y's omission to remedy the defect is negligent make it any more the immediate cause than if the omission were in no way blameworthy. If, as has been seen, X's act would be considered the immediate cause if no question of negligence or illegality were raised, it is evident that the conclusion must be the same, though X's act is characterized by illegality and Y's omission by negligence.

If the foregoing reasoning is sound, its application to the defense based on the plaintiff's unlawful act is plain. If the action is barred whenever the wrongful act caused the accident, the question in each case must be what act was the immediate cause of the result, not who was to blame for it. If it is found that the defendant's act, while blameworthy, served only to create a passive, antecedent condition, and that the plaintiff's unlawful act was the active agency which finally brought about the result, the action must fail, because the unlawful act was the immediate cause of the damage. It follows from this that the much-discussed case of Bosworth *v.* Swansey[1] is entirely sound, as well as several other Massachusetts cases involving similar states of facts. Bosworth *v.* Swansey was an action against a town to recover for injuries received by the plaintiff through a defect in the highway while driving for secular purposes on Sunday. Recovery was denied, on the ground that the unlawful act of driving concurred in causing the damage. According to the principles set forth above, the decision is right. The failure of the town to repair the road merely created a passive condition. Damage could result from this only when some act was done. The act which, in this case, was this active, immediate cause was the unlawful act of driving. On the same principle, Jones *v.* Andover,[2] Connolly *v.* Boston,[3] and Davis *v.* Somerville[4] are right, the facts being substantially as in Bosworth *v.* Swansey. The same is true of Heland *v.* Lowell,[5] another action based on a defect in the highway, but in which the unlawful act consisted in driving at a rate of speed forbidden by a city ordi-

[1] 10 Met. (Mass.) 363. [2] 10 Allen (Mass.) 18. [3] 117 Mass. 64.
[4] 128 Mass. 594. [5] 3 Allen (Mass.) 407.

nance. So, in Read *v.* Boston & Albany Railroad,[1] recovery was rightly refused. The plaintiff, a locomotive engineer, was running an unauthorized Sunday train, and was injured through a defect in the track. The defect was simply an antecedent condition; the unlawful act of running the locomotive was the immediate, efficient cause of the accident.

There seems to be no state outside of Massachusetts in which the view contended for has been maintained with any consistency. Nevertheless, there are very respectable authorities which tend to support it. Thus, in Maine, Bosworth *v.* Swansey has been followed,[2] though Heland *v.* Lowell is repudiated.[3] In Vermont, on the other hand, recovery was refused in a case similar to Heland *v.* Lowell,[4] though the reasoning of Bosworth *v.* Swansey is rejected: however, a person injured through a defect in the highway while driving for secular purposes on Sunday is not allowed to recover, on the ground that the statutes impose on the town no duty of care towards a wrongdoer.[5] So, in Wisconsin, the whole Massachusetts doctrine as applied to the Sunday law is vigorously assailed;[6] yet it is held that a person running upon a bridge a traction engine of a weight forbidden by law cannot recover for damage resulting from the fall of the bridge, even though the bridge would have fallen just the same had the engine been of no greater weight than the law allowed.[7] A case in Texas also tends in favor of the view contended for, though differing in its facts from the others referred to. A horse escaped from his lot and ran through the highway until he came into contact with a barbed-wire fence erected by the defendants. It was held that it was error to submit to the jury the question whether the defendants were guilty of negligence in maintaining such a fence on the street, as the plaintiff was forbidden, by a city ordinance, to allow the horse thus to run at large.[8]

In Idaho,[9] Kansas,[10] New Hampshire,[11] and New York,[12] recovery has been allowed in cases substantially like Bosworth *v.*

---

[1] 140 Mass. 199.

[2] Hinckley *v.* Penobscot, 42 Me. 89; Cratty *v.* Bangor, 57 Me. 423; Beacham *v.* Portsmouth Bridge, 68 N. H. 382 (expounding the Maine law).

[3] Baker *v.* Portland, 58 Me. 199.

[4] Abbott *v.* Wolcott, 38 Vt. 666.

[5] Johnson *v* Irasburg, 47 Vt. 28; Holcomb *v.* Danby, 51 Vt. 428.

[6] Sutton *v.* Wauwatosa, 29 Wis. 21.

[7] Welch *v.* Geneva, 110 Wis. 388.

[8] Galveston Land and Improvement Co. *v.* Pracker, 3 Tex. Civ. App. 261.

[9] Black *v.* Lewiston, 2 Idaho (Hasb.) 276.

[10] Kansas City *v.* Orr, 62 Kan. 61.

[11] Sewell *v.* Webster, 59 N. H. 586; Wentworth *v.* Jefferson, 60 N. H. 158.

[12] Platz *v.* Cohoes, 89 N. Y. 219.

Swansey in their facts, and no qualification is made in the rejection of the principles for which that case stands. In Connecticut[1] and Rhode Island,[2] also, the doctrine of Bosworth *v.* Swansey has been severely criticised, though, in each state, the question arose in a case of collision between vehicles, so that, as will presently be shown, the actual decisions are not necessarily in conflict.

The reasons given for these decisions are various, but the leading arguments in support of them are two: first, that the unlawful act was not the cause, because the same result would have followed if the act had been done at a time, in a manner, or for a purpose that rendered it lawful; second, that if the doctrine of Bosworth *v.* Swansey is applied logically, it must be held that, if a person is injured while doing *any* unlawful act whatsoever, he cannot recover, even though the act had no possible tendency to cause the result. The first argument is thus stated in Kansas City *v.* Orr,[3] one of the latest decisions on the subject, the facts being similar to those in Bosworth *v.* Swansey: "The violation of the Sunday law . . . was not the efficient or proximate cause of the injury. . . . The time when the injury was inflicted is only an incident to the efficient cause of the injury. The injury occurred by reason of the defect in the street, and was as liable to have occurred under similar circumstances on Saturday or on Monday as it did on Sunday. There was not even a remote relation between the violation of the Sunday law and the injury which resulted from the negligence of the city in maintaining its streets in a proper condition." The plain answer to this assertion is that it "is n't so." As has been seen, when a person is injured through a defect in the highway, the *act* of driving or walking is the immediate, efficient cause of the damage. How, then, is it possible to say that the violation of the law had "not even a remote relation" to the accident? The act which constituted the violation of the law was itself the direct cause.

---

[1] Broschart *v.* Tuttle, 59 Conn. 1. (Although Bosworth *v.* Swansey was much criticised in this case, a judgment for the plaintiff was set aside and a new trial granted. The result was the same in the very recent case of Monroe *v.* Hartford St. Ry., 76 Conn. 201, in which the unlawful act consisted in leaving a horse unhitched in the street. Thus it is somewhat difficult to say what is the law of Connecticut on this subject. However, it is believed that the later of the two cases shows a tendency to adopt the view contended for — *i. e.* to lay stress on the question whether the unlawful *act* caused the damage, as distinguished from the abstract "illegality.")

[2] Baldwin *v.* Barney, 12 R. I. 392.

[3] 62 Kan. 61, 67.

As to the second argument, likewise, the answer has already been suggested. The decision in Bosworth *v.* Swansey leads to no such absurd result as is supposed. It does not in the least involve holding that a person injured while, for example, indulging in profanity cannot recover. It is plain that such an act as swearing has absolutely no place in the chain of causation leading up to the event. It cannot be said that if the act had not been done, the accident would not have happened. On the other hand, the unlawful act of driving, in such a case as Bosworth *v.* Swansey, is clearly a cause at least to this extent — that the accident could not have happened if it had not been done. Again, the argument thus far has been directed towards showing that the decision in Bosworth *v.* Swansey may well be supported without going even to this extent. It has been attempted to show that the unlawful act, in such a case, is not only *a* cause of the damage, but *the* immediate, efficient cause. If this be so, it is evident that the objection entirely fails, so far as this class of cases is concerned.

But it must not be forgotten that this article was not undertaken with a view to proving that the Massachusetts decisions are all to be supported. It seems impossible to reconcile many of them either with principle or with authority. It is unfair to assert that they require that recovery be refused whenever the injured party was engaged in an unlawful act at the time of the accident. In practically every Massachusetts case in which recovery was denied, the unlawful act was, at least, a *causa sine qua non*.[1] If the act had not been done, the damage would not have been suffered. But, even so, there is a great difference between such cases, as, for example, Bosworth *v.* Swansey and Lyons *v.* Desotelle.[2] The facts in the latter case were that the plaintiff drove a horse to a certain place on Sunday and hitched him; while the horse was thus standing, the defendant negligently ran into him. After a verdict for the plaintiff, the defendant's exceptions were sustained,

---

[1] In order to be perfectly accurate, the case of McGrath *v.* Merwin, 112 Mass. 467, should be noticed. The plaintiff was unlawfully clearing out a wheelpit on Sunday and was injured through a sudden starting of the machinery. Recovery was not allowed. Apparently, it was perfectly lawful for the plaintiff to go to the mill and to be in the wheelpit; the only breach of the law consisted in removing waste matter which had accumulated in the pit. This act was hardly even a *causa sine qua non:* had the plaintiff wholly abstained from doing it and remained perfectly motionless while in the wheelpit, he would have been injured equally. The result, however, can be supported, as the parties were joint lawbreakers; both were actively assisting in the unlawful work.

[2] 124 Mass. 387.

substantially on the ground that the unlawful act was a contributing cause of the damage. In Bosworth *v.* Swansey, as has been seen, the defendant's negligent act served only to create a dangerous passive condition; the plaintiff's unlawful act of driving was the active agency which finally produced the result. In Lyons *v.* Desotelle, on the other hand, the unlawful act served only to create a passive antecedent condition, from which damage could result only when some further act was done. Thus it would appear that the unlawful act of driving to the place where the horse was hitched was but a remote cause, whereas the defendant's act of driving negligently was the efficient, immediate cause. Hence, in order to support the decision, it must be held that if an unlawful act by the plaintiff can be found anywhere in the chain of causation leading up to the result, the action is barred.

The whole doctrine that recovery is to be denied if the plaintiff's unlawful act was a part of the cause is simply a rule based on public policy. And it might, indeed, be said that public policy requires a rule as stringent as that suggested: in a few cases the rule has been avowedly taken to be so.[1] But it is difficult to justify such an extreme view. The defense based on the plaintiff's wrongdoing is similar to the defense of illegality in an action on a contract. It is not permitted because the defendant deserves the favor of the court, but because the plaintiff has done something which makes the court unwilling to give him relief. The result is, therefore, in the nature of a punishment for the plaintiff's wrongdoing. Now, while this, in itself, is no reason for saying that the defense is never to be allowed, any more than as regards illegality as a defense to a contract, yet it is evident that it should be restricted to close limits. It seems plain that if the illegal act is the immediate, active cause of the damage, recovery is rightly refused. But it is by no means so clear that public policy demands that, if the illegal act was simply a remote link in the chain of causation, the action shall be barred, and the almost unanimous opinion of the authorities is strong evidence that it does not.[2] If it be con-

[1] Jones *v.* Andover, 10 Allen (Mass.) 18; Galveston Land and Improvement Co. *v.* Pracker, 3 Tex. Civ. App. 261. In both of these cases the concession was unnecessary, as the unlawful act was not only *a* cause, but *the* immediate cause.

[2] The following citations, without pretending to be exhaustive, will, perhaps, be sufficient. In all these cases recovery was allowed, notwithstanding the unlawful act. Louisville, etc., Ry. *v.* Frawley, 110 Ind. 18 (plaintiff was injured while attempting to uncouple a car on Sunday. To the same effect, Louisville, etc., Ry. *v.* Buck, 116 Ind. 566); Schmid *v.* Humphrey, 48 Ia. 652 (plaintiff, while driving unlawfully on

ceded, accordingly, that the rule is that the action is not barred unless the unlawful act was the immediate, efficient cause of the damage, then it must follow that Lyons *v.* Desotelle is wrong. The same is true of several other Massachusetts cases, in which the unlawful act had only the effect of putting the plaintiff's person or property in a position to be injured through the defendant's negligence. Thus, in Banks *v.* Highland Railway,[1] the unlawful act consisted in carrying a cable across a street in such a manner as to constitute a nuisance: this simply created a passive condition from which damage could result only when some further act was done — in this case, the act of negligently running a car against the cable. The same applies to the various Massachusetts cases denying recovery to passengers injured while travelling for secular purposes on Sunday.[2] The unlawful act consisted in the plaintiff's putting himself in a position where the carrier's negligent act could operate upon him; the negligent act of the

---

Sunday, was injured through an assault by defendant's dog); Illinois Central R. R. *v.* Dick, 91 Ky. 434 (plaintiff was run down by a train while returning from unlawful Sunday work); Bigelow *v.* Reed, 51 Me. 325 (plaintiff's pung was standing unlawfully in the street; while in this position, it was run into by defendant's horse. To the same effect, Neanou *v.* Uttech, 46 Wis. 581); Philadelphia, etc., R. R. *v.* Lehman, 56 Md. 209 (plaintiff's cattle were injured while being unlawfully transported on Sunday); Carroll *v.* Staten Island R. R., 58 N. Y. 126 (plaintiff, while traveling unlawfully on Sunday, was injured through the carrier's negligence. To the same effect, Opsahl *v.* Judd, 30 Minn. 126; Delaware, etc., R. R. *v.* Trautwein, 52 N. J. Law 169; Landers *v.* Staten Island R. R., 13 Abb. Pr. N. S. 338; Knowlton *v.* Milwaukee City Ry., 59 Wis. 278); Wood *v.* Erie Ry., 72 N. Y. 196 (plaintiff was doing business under a firm name which it was unlawful for him to use. Goods shipped by him in such firm name were damaged in transit); Connolly *v.* Knickerbocker Ice Co., 114 N. Y. 104 (plaintiff was riding on the platform of a street car in violation of a city ordinance; defendant's wagon collided with the car); Solarz *v.* Manhattan Ry., 29 N. Y. Supp. 1123; affirmed 32 N. Y. Supp. 1149 (plaintiff, while working on Sunday, was injured through the fall of a scaffolding); H. & T. C. Ry. *v.* Rider, 62 Tex. 267 (plaintiff was, on Sunday, engaged in removing a wreck from the track. A train was negligently run against a flat car upon which he was); Boyden *v.* Fitchburg R. R., 70 Vt. 125 (plaintiff's intestate, while driving unlawfully on Sunday, was struck by a train at a grade crossing. To the same effect, Van Auken *v.* Chicago, etc., Ry., 96 Mich. 307 (*semble*); Morris *v.* Chicago, etc., R. R., 26 Fed. Rep. 22); Hoadley *v.* International Paper Co., 72 Vt. 79 (plaintiff's intestate was killed while repairing a pulp digester on Sunday by the defendant's negligently allowing steam and gas to escape); McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139 (a canal boat navigated on Sunday was injured through the sudden escape of water from the canal).

[1] 136 Mass. 485.

[2] Stanton *v.* Metropolitan R. R., 14 Allen (Mass.) 485; Bucher *v.* Fitchburg R. R., 131 Mass. 156; Day *v.* Highland St. Ry., 135 Mass. 113. (In the last case the plaintiff was a conductor, not a passenger, but the difference seems immaterial, so far as the question of cause is concerned.)

carrier, not the unlawful act of the passenger, was the immediate cause. So, in Smith *v.* Boston & Maine Railroad,[1] the plaintiff was traveling on the highway unlawfully on Sunday and was struck by a gate negligently operated. The unlawful act of traveling had no tendency to cause the gate to swing as it did: doubtless it would have swung in exactly the same manner if the plaintiff had been ten miles away. The only effect of the unlawful act was that the plaintiff was in a place where the defendant's negligent act could operate on him. So, also, Wallace *v.* Merrimac, etc., Co.[2] cannot be supported. The negligent act in that case consisted in running down the plaintiff's yacht, which he was unlawfully sailing on Sunday. The yacht may have been in motion at the time it was struck, but this motion had no tendency to produce the result: it caused the yacht to be in a position where the force negligently managed by the defendant could be exerted on it.

Not only are the authorities outside of Massachusetts practically unanimous in their disapproval of these cases, but it is impossible to reconcile them with other decisions in Massachusetts itself. Thus, in Steele *v.* Burkhardt,[3] the unlawful act consisted in placing a wagon across a street; while in this position, it was negligently run into by the defendant. It seems plain that the unlawful act was not the direct cause of the damage: it had the effect of creating a passive condition. And it is held that the action may be maintained. So, in Kearns *v.* Sowden,[4] the unlawful act was leaving a team unhitched in the street, and it is held that a person negligently running into the team is liable. So, again, in White *v.* Lang,[5] the plaintiff was driving unlawfully on Sunday, but the damage was caused, not by a defect in the highway, but by an attack by the defendant's dog. The unlawful act, obviously, had no relation to the attack by the dog, except that it caused the plaintiff to be at a place where the dog could attack him. Here, also, it is held that the unlawful act did not prevent recovery.

It seems, therefore, that even the Massachusetts court has recognized the principle that the unlawful act is not a bar merely because it was a *causa sine qua non*. It is not enough that the unlawful act put the plaintiff or his property in a position to be affected by the defendant's negligent act: the unlawful act must

---

[1] 120 Mass. 490. [2] 134 Mass. 95. [3] 104 Mass. 59.
[4] 104 Mass. 63 n. To the same effect, Klipper *v.* Coffey, 44 Md. 117.
[5] 128 Mass. 598.

be the active agency which finally produces the result.[1] If this distinction be recognized, it disposes of the great majority of cases in which the plaintiff's unlawful act is set up as a defense. In one large class of cases, the defendant's negligent act creates a passive condition, while the plaintiff's unlawful act is the active, efficient cause of the damage, as in Bosworth *v.* Swansey. In another, and probably much larger class of cases, the defendant's act is the active, efficient cause, the plaintiff's act only creating an antecedent condition, as in Steele *v.* Burkhardt. However, there may be cases which cannot be placed under either of these heads, both the unlawful act and the negligent act being active, efficient causes. This is particularly true in the case of a collision between vehicles moving in opposite directions. It is plain that, from one point of view, both the plaintiff's act of driving and that of the defendant constituted active, efficient causes of the damage. Yet it does not necessarily follow from the foregoing reasoning as to Bosworth *v.* Swansey that the action is barred. In that case, the defendants exerted no unlawful force on the plaintiff: they simply allowed a condition to exist which made it possible for the plaintiff's unlawful act to have the effect of injuring him. The present case is materially different. The defendant unlawfully exerted force on the plaintiff so as to injure him. Though the plaintiff was, at the time, doing an unlawful act, yet that act had no tendency to bring the force controlled by the defendant to bear on him, except that it put the plaintiff in a position where such force could operate on him. It would not be illogical to hold that the result should be the same as in Bosworth *v.* Swansey : on the other hand, there is a plain distinction between the cases. Thus, it cannot be said that the decisions, which are strongly in favor of recovery in this last state of facts, are wrong.[2]

---

[1] The latest Massachusetts case on the point is Newcomb *v.* Boston Protective Department, 146 Mass. 596. The facts in this case were similar to those in Steele *v.* Burkhardt, *supra*. The plaintiff obtained a verdict, but a new trial was granted on the ground that the instructions to the jury treated the illegality of the plaintiff's act only as evidence of negligence. The *dicta* seem, on the whole, to confirm the writer's position, though they cannot be said to be conclusive. At a second trial, the plaintiff again obtained a verdict, upon which judgment was ordered by the Supreme Judicial Court, 151 Mass. 215.

[2] Hall *v.* Ripley, 119 Mass. 135 (plaintiff was driving at a forbidden rate of speed); Baldwin *v.* Barney, 12 R. I. 392 (plaintiff was driving for secular purposes on Sunday); Broschart *v.* Tuttle, 59 Conn. 1; Riepe *v.* Elting, 89 Ia. 82; Spofford *v.* Harlow, 3 Allen (Mass.) 176; Beckerle *v.* Weiman, 12 Mo. App. 354; Quinn *v.* O'Keefe, 9 N. Y. App. Div. 68. (In the last five cases, the objection to recovery was that the plaintiff

To sum up, the defense of the plaintiff's wrongdoing may be set up in three classes of cases. In the first, the defendant's negligent act creates a dangerous antecedent condition; the plaintiff then does an unlawful act from which, by reason of this dangerous condition, damage results. It is contended that the unlawful act is the immediate cause of the damage and that the action should, therefore, be barred. In the second, the unlawful act creates a passive condition: the defendant then does a negligent act which, supervening upon the condition which has thus been created, results in damage. It is maintained that the unlawful act is a cause of the damage, but so remote a cause that it ought not to have the effect of preventing recovery. In the third, the direct cause of the damage is a combination of agencies operating simultaneously, one being the unlawful act of the plaintiff and the other the negligent act of the defendant. This case is more doubtful, but, on the whole, the decisions permitting recovery seem right.

In conclusion, it is submitted that the rule contended for is at once practicable and just. It is practicable because the distinctions it calls for are readily applied to the great majority of cases. It can seldom, if ever, be difficult to decide whether the unlawful act is a *causa sine qua non.* If it be found that it is thus a part of the chain of causation, the only question will be whether the negligent act, before the accident happened, had issued in a passive condition upon which the unlawful act supervened. The action will be barred only in case it is found that it was the unlawful act which brought damage out of such a passive condition. The proposed rule is also just. Surely, it is unseemly that a person should appeal to the law for redress for an injury caused directly

---

was driving on the left side of the road; the decisions may, in part, be explained as resting on the peculiar nature of the "law of the road," which the courts seem inclined to treat rather as a rule of evidence, establishing merely a presumption of carelessness, than as an inflexible rule of law. See Smith *v.* Gardner, 11 Gray (Mass.) 418; Gale *v.* Lisbon, 52 N. H. 174.)

The plaintiff also recovered, notwithstanding the unlawful act, in two cases relating to collisions of ferryboats, — Hoffman *v.* Union Ferry Co., 68 N. Y. 385; Minerly *v.* Union Ferry Co., 56 Hun (N. Y.) 113. In the first case, the plaintiff's boat did not display the lights required by law; in the second, it was running at a forbidden rate of speed and out of the established channel.

It seems to be conceded that there can be no recovery if, after the defendant became aware of the unlawful act on the part of the plaintiff, he could not have avoided the consequences of it. Central, etc., Co. *v.* Brunswick & Western R. R., 87 Ga. 386. But this is hardly more than saying that if the defendant was not negligent, he is not liable in any event.

by his own unlawful act, and only remotely by other circumstances. It is sometimes objected that this rule makes an outlaw of a person whose offense may be most trifling. The fact is quite otherwise. It is well agreed that the plaintiff's violation of the law is no defense if the defendant acted wantonly or maliciously.[1] And if denying redress for an injury negligently done makes an outlaw of the wrongdoer, it can only be said that this is just as true as to denying recovery to one guilty of contributory negligence. An objection to the doctrine of contributory negligence on this ground would be a novelty, to say the least. Certainly, it is as right that a person whose unlawful act has directly caused his injury should not recover as that one should be barred whose negligent act has, even in the slightest degree, formed a part of the immediate cause of the damage he has suffered.

Harold S. Davis.

BOSTON.

---

[1] Welch *v.* Wesson, 6 Gray (Mass.) 505; Wallace *v.* Merrimac, etc., Co., 134 Mass. 95.